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SYARIKAT SESCO BHD

v.

YU THIAN MOTOR SERVICES SDN BHD

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HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[CIVIL APPEAL NO: KCH-12B-16-4-2012]
10 OCTOBER 2012

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PUBLIC UTILITIES: *Electricity - Supply and consumption - Tampering of meter - Under recording of actual consumption - Arrears of electricity consumption - Claim for - Duty to ensure full understanding of terms and conditions before signing of contract for supply of electricity - Whether there was a corresponding duty on consumer to not simply sign*

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without understanding what he was signing - Signing without understanding document's content - Whether form of negligence - Whether inspection of meter had to be conducted by gazetted inspectors - Whether contract for electricity supply admissible - Electricity Ordinance, s. 33A

E

TORT: *Occupier's liability - Duty of occupier - Tampering of electricity meter - Claim for arrears - Whether occupier of premises liable in absence of evidence as to who had tempered with meter - Principle of occupier's liability - Whether occupier responsible*

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The plaintiff, the sole electricity provider for the whole of Sarawak, had sent two of its employees to conduct a routine inspection of the electricity meter at the defendant's premises. It was discovered that the meter installed had been disturbed and tampered with, resulting in a slow reading by about 61%. The plaintiff subsequently replaced the tampered meter with a new one which

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showed a higher reading by the same percentage. Based on the plaintiff's calculations of what should be the actual usage for the past three years, the plaintiff claimed an amount of RM34,461.20 in the Sessions Court. The Sessions Court Judge, in finding that the General Terms and Conditions of Electricity Supply ('GTC')

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upon which the plaintiff's claim was based, had not been brought to the attention of the defendant's witness, DW1, in that the same was never explained to him in Mandarin when he signed the contract, had dismissed the plaintiff's claim. Thus, this appeal. The issues that arose herein were (i) whether the plaintiff owed a duty

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to the defendant to ensure that they fully understood the terms

and conditions before they signed the contract for the supply of the electricity; (ii) whether there was evidence that it was the defendant who tampered with the meter; (iii) that the inspection and removal of the original meter by PW2 and PW3 was illegal because these two persons were not gazetted as inspectors under s. 3(2) of the Electricity Ordinance ('the Ordinance'); (iv) whether based on the recently reported case *Tenaga National Bhd v. JCY HDD Technology Sdn Bhd*, the plaintiff's civil claim for arrears of electricity consumption could not be allowed without a conviction for meter tampering; and (v) since the contract for electricity supply was unstamped, it was inadmissible.

Held (allowing appeal with costs of RM10,000):

(1) The plaintiff as the sole provider of electricity in Sarawak had a monopolistic control which gives consumers absolutely no choice but to sign the contract and agree to the terms and conditions imposed on them. Although the plaintiff owed a duty to the defendant to ensure that they fully understood the terms and conditions before they signed the contract for the supply of electricity, there was, however, a corresponding duty on the part of the consumer to not simply sign without understanding what he was signing. It is a self folly to sign on a document that one does not understand. Simply signing without understanding a document's content was a form of negligence. (paras 6 & 7)

(2) Clause 8 of the standard terms and conditions of the contract provides that it is the consumers' responsibility if "the meter, seal or cut-out is removed or tampered with". The meter was installed in the defendant's premises thus they were in the position to ensure that it was in good working order and not tampered with. This was consonant with the principle of occupier's liability and as an occupier of the premise, the defendant should be responsible for the matters arising in his domain. Further, the said cl. 8 does not say that it must be the defendant who tampered with the meter. Even if a third party does it, as the occupier and licensee, the defendant must be held accountable unless the defendant can prove that it was not done at their behest. (para 8)

(3) The Sessions Court Judge had erred when he invoked an adverse inference against the plaintiff for not calling one Thomas Lumpu who conducted the re-testing because his evidence was merely a re-confirmation of the testing done by PW2. An adverse inference is only to be drawn when evidence has been withheld or suppressed (*Munusamy v. PP*, refd). Further, PW2's evidence on the slowing of the meter by 61.89% was never challenged in cross-examination, nor the high consumption after the installation of the new meter. This being a crucial part of the plaintiff's case, the failure to do so meant that the evidence was accepted and binding against the defendant (*Wong Swee Chin v. PP*, refd). (para 9)

(4) Clause 9 of the standard terms and conditions clearly provides that any authorised representative of the plaintiff can conduct the inspection and by virtue of PW2's and PW3's positions in the plaintiff corporation *ie*, engineering assistant and technician, respectively, it was reasonable to infer that they were authorised to perform the task. Further, the Ordinance did not provide that only gazetted inspectors could conduct inspections of meters installed. (paras 10 & 12)

(5) Section 33A(1) of the Ordinance clearly showed that whether prosecution for meter tampering was instituted or not, the loss of revenue was still payable. The cited case of *Tenaga National Bhd v. JCY HDD Technology Sdn Bhd* had no application on the facts of the case for the reason that the relevant provision s. 38(3) of the Electricity Supply Act 1990 relied upon in the said case was materially different from the said Ordinance on the same matter. (para 14)

(6) The unstamped document could still be admitted on payment of the prescribed fee or penalty under s. 52(1) of the Stamp Act 1949. However, in this case, the objection raised by the defendant that the contract for the electricity was inadmissible since it was unstamped was raised too late in the proceeding *ie*, only in this appeal and not before the Sessions Court Judge. Therefore, it was not open for adjudication. Further, the issue raised would not have a bearing on the final outcome of the appeal. (para 16)

Case(s) referred to:

Daniel Chung Ah Brooke v. Samuel Chung Khong Nee & Ors [2011] 1 LNS 545 ***(refd)***

Goh Jong Seng v. MB Melwani Pte Ltd [1990] 1 LNS 160 HC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 CA ***(refd)***

Subramanian v. Retnam [1965] 1 LNS 169 HC ***(refd)***

Tenaga National Bhd v. JCY HDD Technology Sdn Bhd [2012] 1 LNS 168 HC ***(dist)***

Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, s. 38(3)

Electricity Ordinance (Sarawak), ss. 3(2), 8(1)(a)(i), (1)(c), (2), 33A(1)

Stamp Act 1949, s. 52(1)

For the appellant - Tony Ling Lee Tom; M/s HC Lee & Partners Advocates

For the respondent - Lim Heng Choo; M/s Lim & Lim Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

Rhodzariah Bujang J:

[1] The plaintiff company is the sole electricity provider for the whole of Sarawak. Of late, as can be seen from the stories highlighted in the newspapers, the plaintiff has been actively pursuing errant consumers who have cheated over the usage or consumption of their electricity by tampering with the electricity meters installed at their premises. The defendant company is alleged to be one of such defrauders. An inspection carried out by two of the plaintiff's employees on 28 April 2010 discovered that the meter installed at the pillar of the gate to the defendant's premises revealed that the meter grip lock seal have been disturbed and tampered with and the meter box seal missing. It was found to show a slow reading by about 61%. Scratch marks were also seen on the seal and an indicator on the meter showed "Diagnosis 12". These proved, contended the plaintiff, that it was indeed tampered with. The meter was subsequently replaced with a new one. The defendant's electricity consumption after the installation of the new meter showed a higher reading by the same percentage.

[2] The plaintiff's employee named Thomas Lumpu re-tested the old meter and confirmed that it was slow by at least 61%. Based on their calculations of what should be the actual usage for the past three years, the plaintiff company found the defendant company was in arrears of RM38,957.22, inclusive of the cost of the new meter and administrative cost but they claimed for a lesser amount in the Sessions Court, which was RM34,461.20. After a full trial, their claim was dismissed by the learned Sessions Court Judge and their appeal is now before me.

Reasons For The Dismissal

[3] The main reason advanced by the learned Sessions Court Judge in his grounds of judgment is that the plaintiff's general terms and conditions of electricity supply ("the standard terms and conditions") upon which the claim is based has not been brought to the attention of the defendant's witness, Mr Chew Siong Thiam (DW1) in that the same was never explained to him in Mandarin.

[4] The relevant clauses of the general terms and conditions relied upon by the plaintiff as pleaded in the statement of claim are, *inter alia*, as follows:

> (c) Where a meter has been found not to register actual consumption caused by the failure of the fuses or open circuiting of current transformers connection or other causes, the plaintiff reserves the right to recover the arrears up to a period of six years; (Clause 7(b))
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> (d) On completion of each connection and the meters and cut-out sealed, the defendant shall be held responsible if the meter, seal or cut-out is removed or tempered with. (Clause 8)
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> (e) Any authorized representative of the plaintiff shall have the right to enter any Defendant's land, premises or building at all reasonable hours for the purposes of examining and inspecting instruments installations and equipment in order to ascertain whether there is or has been any contravention of the Electricity Ordinance or its subsequent amendments of the terms and conditions of the contract. (Clause 9)
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> (f) The defendant will be held responsible by the plaintiff for the safe keeping of all meters and other equipment belonging to the plaintiff placed on the premises. Should any damage or

> injury be caused thereto by fire, water, accident or any other causes for which the plaintiff is not responsible, the defendant shall pay to the plaintiff on demand the cost of making good any such damage or injury. (Clause 10)

[5] At the trial, evidence was shown that the standard terms and conditions were produced in two copies. The first copy, tendered as exh. P2 was in the plaintiff's bundle of documents dated 6 January 2012 and the second copy, in the plaintiff supplementary bundle of documents dated 12 January 2012. The first copy was without any markings but the second was initialled according to the appellant's fourth witness, PW4 on every page by the respondent's representative Mr Chew Siang Thiam (DW1). PW4 was the counter staff who attended to DW1 when the contract for the electricity supply (exh. P1 at the trial) was signed. There was no dispute that he had initialled on the standard terms of conditions which is exh. P13 but only that the same were not explained to him in Mandarin, though the evidence of PW4 is that he understood English because they spoke in English. She had, she testified, told him to sign on it if he agreed to the terms and conditions.

[6] The argument of the defendant is that the plaintiff being the sole provider of electricity in the state of Sarawak has a monopolistic control which gives the consumers like the defendant absolutely no choice but to sign the contract and agreed to the terms and conditions imposed on them. Therefore, submitted their counsel, Mr Lim Heng Choo, the plaintiff owed a duty to the defendant to ensure that they fully understood the terms and conditions before they signed the contract for the supply of the electricity. That, I agree with him, should be the case though I believe that there is a corresponding duty on the part of the consumer to not simply sign without understanding what he is signing. It is his right to insist on a translation when it is required and if the same is unreasonably withheld, then I would totally agree that such arrogance would militate against the one who is in the position of dominance over the other. In that situation, the English doctrine of inequality of bargaining power advocated for use in Malaysia in *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98 could then be applied. The Court of Appeal in the said case as cited by Mr Lim Heng Choo, further advised that the

courts should "strived to protect those incapable of protecting themselves, not against their own folly, but against those who would take advantage of them by being in a superior bargaining position".

[7] Whilst I noted the advice given, I also think that it is a self folly to sign on a document that one does not understand and I have earlier made clear my view that it is the defendant's own fault if DW1 simply initialled on the standard terms and conditions without understanding them. Also on this issue I would refer to the case of *Subramanian v. Retnam* [1965] 1 LNS 169; [1966] 1 MLJ 172 where it was held that even though the defendant was ignorant of the English language, he would still be bound by the written contract entered into by him in the absence of fraud or misrepresentation. Further, as is stated in *Goh Jong Seng v. MB Melwani Pte Ltd* [1990] 1 LNS 160; [1991] 1 MLJ 482, before the plea of *non est factum* can be successfully raised, two factors must be present. First, if the document signed was significantly different from that which the signer believed it to be and two, the signer must not be negligent when he signed it. Simply signing without understanding a document's content is, in my view a form of negligence. Additionally, I do not think that the admission of the plaintiff's witness, PW1 that there was no acknowledgement of the receipt of the contract and the standard terms and conditions, would materially affect my final view that the standard terms and conditions is part of the contract for the supply of the electricity. The documents are not goods which are sold and delivered and must be shown to have been received. I am therefore of the respectful view that the learned Sessions Court Judge has wrongly evaluated the evidence before him on this issue.

Meter Tampering

[8] Clause 8 of the standard terms and conditions of contract as reproduced earlier provides that it is the consumers' responsibility if "the meter, seal or cut-out is removed or tampered with" and the supply of electricity will be disconnected when this happens. The learned Sessions Court Judge held that this clause is unfair and that there is no evidence that it was the defendant who tampered with the meter. However, the fallacy of that finding, as Mr Tony Ling for the plaintiff has submitted, is that the meter

being installed in the defendant's premises, they are in the position to ensure that it is in good working order and not tampered with. This I must add is consonant with the principle of occupier's liability and as an occupier of the premise, the defendant should be responsible for the matters arising in his domain. There is therefore nothing unjust or unfair about that clause. Further, the said cl. 8 does not say that it must be the defendant who tampered with the meter. Even if a third party does it, as the occupier and licensee the defendant must be held accountable unless the defendant can prove that it was not done at their behest. Feigning ignorance of it is, in my considered view, simply not enough to defeat the plaintiff's claim.

[9] In this regard, and as mentioned earlier but I would still stress, evidence has been led from PW2 who examined the meter and seen the indicator showing a "Diagnosis 12" as proof that the meter has indeed been tampered with so as to slow its reading and the evidence of consumption of electricity by the defendant after a new meter has been installed proves as well that the consumption of electricity was markedly high by 61% from the previous reading. It is therefore not just the scratch on the seal as highlighted by the learned Sessions Court Judge which proves that the meter has been meddled with. The scratch line is only an indication that the seal was opened and that it was missing. Further in my view and with respect, he has erred when he invoked an adverse inference against the plaintiff for not calling one Thomas Lumpu who conducted the re-testing because his evidence is merely a re-confirmation of the testing done by PW2. An adverse inference is only to be drawn when evidence has been withheld or suppressed as decided by the Supreme Court in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 which definitely is not the case here. Additionally, as the notes of proceeding show, PW2's evidence on the slowing of the meter by 61.89%, to be precise, was never challenged in cross-examination, nor the high consumption after the installation of the new meter. This being a crucial part of the plaintiff's case, the failure to do so means the evidence is accepted and binding against the defendant as stated in *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212.

A **Unauthorised Personnel**

[10] Mr Lim Heng Choo has submitted and the learned Sessions Court Judge agreed with him that the inspection and removal of the original meter by PW2 and her colleague, PW3 was illegal because these two persons were not, as they both admitted in their cross-examination, gazetted as inspectors under s. 3(2) of the Electricity Ordinance (Sarawak). However, cl. 9 of the standard terms and conditions clearly provides that any authorised representative of the plaintiff can conduct the inspection and by virtue of PW2's and PW3's positions in the plaintiff corporation, ie, engineering assistant and technician, respectively, it is reasonable to infer that they were authorised to perform the task as they testified in court.

[11] Mr Lim Heng Choo also raised the point that since the demand letter for the arrears (at p. 55 of the appeal record (Part C)) is based on s. 33A of the Ordinance, PW2 and PW3 must be gazetted under s. 3(2) of the Ordinance before they can recover the arrears. I do not agree that the position is so given the express condition given under clause as discussed earlier. The statutory right to collect the arrears (or loss of revenue as it is described in s. 33A) is clearly independent of the powers and duties of the inspectors appointed under s. 3 for the reason that when I examined the Ordinance, I do not see any provision which provides that only the gazetted inspectors can conduct inspection of meters installed. Section 8 of the said Ordinance which provides for periodical inspection of installation is silent as who should, under sub-s. (2), conduct the inspection as it merely provides as follows:

> s. 8(2) In addition to periodical inspections during construction and final inspections on completion, all installations, while in operation, shall be subject to such periodical inspections as may be prescribed.

[12] It follows therefore that cl. 9 is applicable to allow inspection by authorised personnel of the plaintiff; not just the gazetted inspectors. This intention I gleaned from the fact that unlike s. 8(2), in s. 8(1)(c) it is expressly mentioned that only the chief electrical inspector or any inspector or any person authorised by him in writing can inspect the works and installation specifically

mentioned therein and that too after notice has been given under s. 8(1)(a)(i). Thus, in my view, when the inspectors are not specifically mentioned in the provisions, the inspection can be done by other authorised persons from the plaintiff corporation.

A Conviction Of Meter Tampering

[13] Mr Lim Heng Choo submitted, based on the recently reported case of *Tenaga National Bhd v. JCY HDD Technology Sdn Bhd* [2012] 1 LNS 168; [2012] 3 AMR 576 that the plaintiff's civil claim for arrears of electricity consumption cannot be allowed without a conviction for meter tampering. I am afraid that the cited case has no application to the facts of this case for the reason that the relevant provision of the Electricity Supply Act 1990 relied upon by Varghese George Varughese J in the said case is materially different from our Ordinance on the same matter.

[14] Section 38(3) of that Electricity Act provides:

> (3) The licensee may require the consumer to pay him for the loss of revenue **due to the offence** committed under section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply. (emphasis added)

Whilst our s. 33A(1) of the Ordinance provides as follows:

> (1) Where a licensee is satisfied that:
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> (a) any meter installed for the purposes of section 4E(1) has been tampered with or damaged to prevent it from accurately recording the quantity of electricity supplied to the consumer; or
>
> (b) any supply line or apparatus or system had been tampered with or altered or adjusted or operated in such a manner as to dishonestly abstract or divert energy,
>
> then **without prejudice to any prosecution that may be instituted against him for an offence under this Ordinance**, the consumer shall be liable to pay to the licensee loss of revenue suffered by the licensee in consequence of it. That loss of revenue shall be assessed by the licensee. (emphasis added)

[15] It is plain from my reading of the two sections that the recovery of the loss revenue in the Act is dependent on the conviction whereas in the Ordinance, the words as I underlined above clearly shows that whether prosecution for meter tampering is instituted or not, the loss of revenue is still payable.

Unstamped Contract

[16] Mr Lim Heng Choo submitted that since the contract for the electricity was unstamped it is inadmissible. I have in the case of *Daniel Chung Ah Brooke v. Samuel Chung Khong Nee* & Ors [2011] 1 LNS 545 opined that the legal position is not automatically so, in that the unstamped document can still be admitted on payment of the prescribed fee or penalty under s. 52(1) of the Stamp Act 1949. However in this case, this objection is raised too late in the proceeding ie, only in this appeal - not before the learned Sessions Court Judge at the conclusion of the trial, nor when the contract was tendered as evidence though, to be fair, it was raised in PW1's cross-examination. Given the delay, I do not therefore think it is open for me to adjudicate on the issue at this appeal. If I were wrong to say so, the document is still admissible but the plaintiff must pay the penalty as well as the prescribed fee under the Act for it and that is all. The issue raised will not have a bearing on the final outcome of this appeal which is that it is allowed with cost of RM10,000 here and below.